No. 22614

IN THE

United States Court of Appeals

FOR THE NINTH CIRCUIT

APPLE VALLEY BUILDING AND DEVELOPMENT CO., INC.,
Appellant,

vs.

BONANZA AIR LINES, INC.,
Appellee.

APPELLANT'S OPENING BRIEF.

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Jurisdiction.

The jurisdiction of the District Court is based on diversity of citizenship under 28 U.S.C.A. 1332. The action was brought by appellant Apple Valley Building & Development Company, Inc. (hereinafter "Apple Valley") against appellee Bonanza Air Lines, Inc. (hereinafter "Bonanza"). At the time of commencement of the action, Apple Valley was a California corporation with its principal place of business in California.[1] [Clk. Tr. 2.] Bonanza is a Nevada corporation with its principal place of business in Arizona.[2]

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[1]Since the commencement of the action, Apple Valley has been merged with Reserve Oil and Gas Company. Reserve is also a California corporation, with its principal place of business in California.

[2]The complaint alleged that Bonanza's principal place of business was in Nevada. [Clk. Tr. 2.] Bonanza's Answer and

(This footnote is continued on the next page)

[Clk. Tr. 258.] The amount in controversy, exclusive of interest and costs, exceeds $10,000. [Clk. Tr. 2.]

This appeal is from an order of the District Court granting Bonanza's motion for summary judgment. [Clk. Tr. 266.] The action is to recover rent and other charges due pursuant to a written lease. The amount claimed by Apple Valley is $41,054.26.[3] [Clk. Tr. 119.] The judgment awards only $7,382.46. [Clk. Tr. 266.] The basis of the decision is that Apple Valley, by its conduct and oral agreement, had waived its right to the further amount claimed. [Clk. Tr. 266.] This court has jurisdiction of the appeal under 28 U.S.C.A. 1291, which authorizes appeals from final decisions of the District Court.

Statement of the Case.

The Terms of the Lease.

This is a suit to recover rent and other charges due under a lease of airport facilities. The lease is in writing and dated July 1, 1957.[4] [Clk. Tr. 5.] The lease provides that Bonanza will pay Apple Valley three types of rent or other charges:

1. Space rental of $3.50 per square foot per year, payable monthly, for 1,640 square feet of space leased. This amounts to $478.33 per month.

Amended Answer denied the jurisdictional allegations, except to admit only that it was incorporated in Nevada. [Clk. Tr. 11, 32.] The findings of fact which Bonanza submitted in connection with its motion for summary judgment stated that its principal place of business was in Phoenix, Arizona. [Clk. Tr. 258.]

[3]The complaint alleged the total amount due as $43,054.26. The claim is based on the weight and number of landings of F27 airplanes. After discovery the correct amount was determined to be $41,054.26. [Clk. Tr. 119.]

[4]The lease was actually executed in November of 1957. [Clk. Tr. 184-186].

2. A minimum landing charge of six cents per thousand pounds per landing of aircraft having a maximum weight of 25,000 pounds. This amounts to $1.50 per month per landing of aircraft weighing up to 25,000 pounds.

3. An excess weight charge of fifty cents per thousand pounds per landing of aircraft to the extent that they weigh more than 25,000 pounds.

The portion of the lease setting forth these charges is as follows:

"(a) A sum per month calculated and determined on the basis of Three and 50/100 Dollars ($3.50) per square foot per year for the 1,640 square feet shown on Exhibit 'A'.

"(b) A sum per month calculated and determined on the basis of six cents (6¢) per thousand pounds of approved landing weight of Bonanza's aircraft per landing up to an approved maximum landing weight of 25,000 pounds, plus an excess weight charge of fifty cents (50¢) per thousand pounds above 25,000 pounds per landing per month." [Clk. Tr. 6.]

The Space Rental and Minimum Landing Charge Are Not in Dispute.

There is no dispute about the first two items, space rental and minimum landing charge. The complaint alleged that space rental was due for the period November 30, 1964, through December 31, 1965 [Clk. Tr. 3, par. 6]; and that the minimum landing charge was due for 1,097 landings. [Clk. Tr. 4, par. 8.] In its opposition to the motion for summary judgment, Apple

Valley reduced this portion of its charge to space rental for the period November 30, 1964, through November 30, 1965, which is $5,739.96. [Clk. Tr. 119, lines 13-17.] The number of landings on which the minimum landing charge was due was reduced to 1,095. [Clk. Tr. 119, lines 24-27.] At $1.50 per landing, this is $1,-642.50. The total of these items is $7,382.46, which is the amount of the summary judgment. [Clk. Tr. 266.]

Apple Valley's Claim for the Excess Weight Charge.

The controversy centers around the excess weight charge, for which the court allowed no recovery. The complaint alleged that these charges were due for the period June 1, 1960, through November 30, 1965. [Clk. Tr. 3-4, pars. 7 and 8.] The exact amount due for excess weight charges can be calculated from Bonanza's answers to interrogatories. Therein Bonanza stated that for the period June 1, 1960, through November 30, 1965, there were 1,020 landings of airplanes weighing 36,000 pounds; 1,633 landings of 36,700 pounds; and 2,963 landings of 37,500 pounds. [Clk. Tr. 17-18.] At fifty cents per thousand pounds over 25,000 pounds, this amounts to $33,681.80.

Bonanza's Answer.

In its Amended Answer, Bonanza alleged that there was a mistake in paragraph 3(b) of the lease, which is the paragraph in question providing for the excess weight charge. Bonanza alleged that the parties orally agreed to a paragraph providing for an excess weight charge identical to that contained in the written lease, except that it provided for a charge of $.50 per thousand lbs. in excess of 25,000 lbs. *per schedule per month*

instead of per landing. [Clk. Tr. 36-35, Fifth Affirmative Defense.] Under Bonanza's contention, the charge would be due, but in a much lesser amount. If an airline has two scheduled flights per day during the given month, it has only two schedules during that month. But the number of landings in a thirty day month on two schedules would be sixty. Bonanza did not admit, however, that any amount was due, though it admitted in its answers to interrogatories that there had been a substantial number of landings on which the charge would be due under its own interpretation of the agreement. Bonanza alleged in its answer that it had notified Apple Valley of the mistake in Paragraph 3(b) when it discovered the mistake in April of 1960; that Apple Valley failed to assert any rights under Paragraph 3(b); and that Apple Valley thereby waived its right to the excess weight charge completely. [Clk. Tr. 35, par. IV.]

Bonanza's Pre-Trial Statement.

Bonanza's claim of waiver was amplified in its pre-trial statement. Therein, Bonanza said that up to June of 1960 it operated Douglas DC3 aircraft which weighed only 25,000 pounds. As of June 1, 1960, it inaugurated Fairchild F27A service at Apple Valley. These airplanes weighed 36,000 pounds at first; later the weight was increased to 36,700 pounds; and still later to 37,400 pounds.[5] [Clk. Tr. 49.] The pre-trial statement goes on to say that on April 22, 1960, Bonanza discovered the "mistake or ambiguity" in Para-

[5]The answers to interrogatories stated that the ultimate weight of the F27A was 37,500 pounds. [Clk. Tr. 17-18.] The difference of 100 pounds is de minimus as it amounts to only 5¢ per landing, or a difference of $148.15 for 2,963 landings.

graph 3(b) of the lease and notified Apple Valley that it was going to use F27A aircraft which would weigh over 25,000 pounds. Bonanza said it told Apple Valley that it interpreted Paragraph 3(b) to mean that the excess weight charge applied only to schedules, and that on a basis of three schedules per day the charge would only be $16.50 per month for aircraft weighing 36,000 pounds. [Clk. Tr. 40.] Thereafter, Apple Valley billed only for the space rental and minimum landing charge until January of 1965. Bonanza paid only the space rental and minimum landing charge. Since Apple Valley did not bill for any excess weight charge before January of 1965, Bonanza argued that the claim was waived entirely. [Clk. Tr. 40-43.]

The Motion for Summary Judgment.

Thereafter Bonanza moved for summary judgment, and the court granted the motion on the theory that Apple Valley had by its conduct and by its oral agreement waived all rights to any excess weight charge. [Clk. Tr. 266.] Thus, the court denied recovery of even the per schedule charge which would be due under even Bonanza's interpretation of the contract. The evidence does not support the finding that Apple Valley waived its right to the excess weight charge, and in any event there is clearly a conflict in the evidence. The facts developed through discovery and shown in the affidavits filed in connection with the motion for summary judgment are as follows:

The Claim of Mistake or Ambiguity—
Mrs. Murphy's Deposition.

There is no mistake or ambiguity in the lease. The lease was executed on behalf of Bonanza by its vice

president and secretary Florence J. Murphy. [Clk. Tr. 10.] Prior to execution of the lease she prepared a proposed draft which she sent to Apple Valley on May 1, 1957. The draft provided for excess weight charges on a *per schedule* basis [Clk. Tr. 160.], and she pointed out in her letter of transmittal that this was the basis for the excess weight charge that she proposed. [Clk. Tr. 166.] Mrs. Murphy also prepared the lease that was later executed as of July, 1, 1957, and which contains the clause (Par. 3(b)) providing for the excess weight charge on a *per landing* basis. It was typed by her secretary [Clk. Tr. 126, lines 13-19.] In her deposition, Paragraph 3(b) was read to Mrs. Murphy. [Clk. Tr. 126.] She said that this accurately reflects the agreement between Apple Valley and Bonanza. [Clk. Tr. 127, lines 7-12.] She said that Newt Bass, who negotiated the lease on behalf of Apple Valley insisted that the excess weight charge be on a *per landing* basis instead of a *per schedule* basis. [Clk. Tr. 127, lines 13-24.] Mrs. Murphy said she was concerned over this because it would result in additional charges to Bonanza, and she was sure that she discussed it with Mr. Converse, the President of Bonanza. [Clk. Tr. 127, line 125, to 128, line 11.] Mr. Converse told her not to be too concerned because he did not think the F27 would ever be used at Apple Valley. [Clk. Tr. 130, line 24, to 131, line 12.] Later, Mrs. Murphy testified again that she knew that the lease she prepared and executed provided for the excess weight charge on a *per landing* basis, that she was concerned about it, that she discussed it with Mr. Converse, and that he said not to worry about it. [Clk. Tr. 136.]

Bonanza's Claim of Waiver.

There was no waiver of the excess weight charge. In view of the testimony of Mrs. Murphy that she negotiated and executed the lease for Bonanza and clearly understood that the excess weight charge was to be on a per landing basis, it is difficult to see how Bonanza could argue to the contrary. Yet that is the position that Bonanza continued to take in its motion for summary judgment. In its motion for summary judgment Bonanza offered no evidence to contradict Mrs. Murphy. Instead it merely asserted that it construed Paragraph 3(b) of the lease to mean that the excess weight charge was to be on a per schedule basis. Bonanza also asserted that on April 22, 1960, it orally notified Apply Valley that it intended to institute F27A service, that it interpreted the excess weight charge to be on a per schedule basis, and that Apple Valley did not bill for any excess weight charges until January of 1965. One additional allegation was added to the claim that Apple Valley had waived its right to any excess weight charge. Bonanza's memorandum of points and authorities in support of the motion for summary judgment says that at a meeting on April 22, 1960, the Apple Valley officials agreed with Bonanza's interpretation of Paragraph 3(b) and stated that Bonanza would be advised if Apple Valley took a different view after further consideration. [Clk. Tr. 63, lines 23-27.] This alleged "tentative" agreement is not supported by the Bonanza affidavits, and is in sharp conflict with the Apple Valley affidavits.

The Bonanza Affidavits.

The Bonanza affidavits which are supposed to prove the agreement to accept Bonanza's interpretation are the affidavits of Louis Arpin and Arthur Taylor. [Clk. Tr. 63, lines 26-27.] Arpin said he was present at a meeting representing Bonanza, but he could not say positively that there was any agreement. He said that "to the best of my recollection, the representatives of Apple Valley concurred or appeared to concur in our interpretation of Article III-B." [Clk. Tr. 92, lines 9-11.] Taylor was not present at the meeting. His affidavit was made for the purpose of showing some hand written notes made by Ralston O. Hawkins. Hawkins was the other Bonanza representative and is now deceased. Hawkins' notes show positively that there was no agreement. The notes say this:

> "We told them of our interpretation of the excess weight charge. They had no disagreement but I am not sure they bought it.
>
> "Newt Bass will take up the matter with Bd of Directors on Monday April 25 - We are supposed to get an answer shortly thereafter -" [Clk. Tr. 94.]

Hawkins' notes go on to say that:

> "Under *our* interpretation of the excess weight proposition of the contract *our* landing fees at Apple Valley will be $5.04 per day x 30 = $151.20 monthly approx." [Clk. Tr. 94.]

"Our interpretation" means Bonanza's interpretation. For the period June 1, 1960 through November 30, 1965, this would amount to $9,979.20, and would actually be somewhat higher, as the weight of the F27

was increased from 36,000 pounds to 36,700 pounds in 1961, and to 37,500 pounds in 1963. [Clk. Tr. 18.] In other words, even if we disregard Mrs. Murphy's testimony and accept Bonanza's interpretation of the lease, and even if we accept Bonanza's contention that there was an agreement, it was not an agreement to waive all excess weight charges. The agreement, if there was one, was to accept a lesser weight charge which would be at least $9,979.20. Yet the court held that Apple Valley, by its conduct and oral agreement, had waived the right to any excess weight charge.

The Apple Valley Affidavits.

The Apple Valley affidavits show that there was no agreement and no waiver. According to Arpin, the Apple Valley representatives at the alleged April 22, 1960, meeting were William Barris and William Sawyer. [Clk. Tr. 91, lines 19-20.] Sawyer's affidavit shows that he has no recollection of any meeting on April 22, 1960, with Hawkins, Arpin, Barris or anyone else; and that he never discussed the excess weight landing fee provision with Bonanza representatives at any time. [Clk. Tr. 223.] Barris' affidavit shows that he also has no recollection of any meeting on April 22, 1960, and Barris says that he had nothing whatever to do with lease negotiations prior to January 26, 1965. [Clk. Tr. 213, lines 17-23.] Barris added, however, that he did have a meeting on January 26, 1965, with Arthur Taylor and Earl Hall who is another Bonanza representative. [Clk. Tr. 213, lines 23-25.] At this meeting Bonanza acknowledged its obligation for the excess weight charge. Barris says:

> "The subject of excess weight charges as provided by the terms of the written lease was dis-

cussed. Taylor and Hall agreed that Bonanza owed money to Apple Valley Building and Development Co. and agreed that Bonanza would furnish to Apple Valley Building and Development Co. a statement according to their interpretation of the wording used; that there was a misunderstanding in their accounting department and that it would be taken care of. They stated that the wording of the lease had been misinterpreted and that this was an issue that would have to be settled. I repeated that the position of Apple Valley Building and Development Co. was as stated in the billing of January 19, 1965." [Clk. Tr. 214, lines 18-29.]

Barris also made a written memorandum of this meeting with Hall and Taylor, which shows that on January 26, 1965, Hall and Taylor agreed that Bonanza owed Apple Valley for the excess weight charge. Barris' affidavit and this memorandum show also that there was no prior agreement to waive the charge. [Clk. Tr. 217.]

The Failure to Bill for the Excess Weight Charge Was Explained.

The evidence shows why Apple Valley did not bill for the excess weight charge prior to January of 1965. It did not know the weight of the F27A, and hence did not know that the charge had become applicable. Up until June of 1960 Bonanza used DC3s. The DC3 weighs only 25,000 pounds. At the time the lease was made it was not contemplated that any other type of airplane would be used, and so the excess weight charge

was a moot question. Apple Valley, of course, knew that Bonanza began using the F27A in June of 1960. But there is a substantial question of whether Apple Valley knew the weight of the F27A. In all correspondence during the relevant period the weight of the F27A is not mentioned, and significantly there is also no mention of any oral agreement of April 22, 1960, or of the excess weight charge provision.

The affidavit of Walter E. Cramer, Jr. [Clk. Tr. 219], shows that Apple Valley was not advised of the weight of the F27 until February of 1964. Cramer was, prior to the merger with Reserve Oil and Gas Co., the Assistant Secretary and later the Secretary-Treasurer and a Vice-President of Apple Valley. He was the person who was in charge of such things as this. Cramer examined all of the books and records of Apple Valley and determined that there was nothing to indicate that any meeting was held with Bonanza on April 22, 1960, or any discussion of any kind in connection with the excess weight charge provision. If anything of that nature had occurred, it would have been referred to Apple Valley's legal counsel. [Clk. Tr. 219, line 16, to 220, line 8.] Cramer did not know what the F27 weighed. [Clk. Tr. 220, lines 17-23.] In preparation for a meeting in February of 1964 to renegotiate the lease, he reviewed the lease and noted the excess weight charge provision. At the meeting he asked the Bonanza representatives what the F27 weighed. They said it was then 37,500 pounds. Cramer said that that would mean

that Bonanza owed Apple Valley an additional charge for the F27 operation. The Bonanza officials did not deny this, and they did not claim there had been a waiver of the charge. They did not even at that time assert their per schedule interpretation of the lease. Cramer says that Myron Reynolds, one of the Bonanza representatives, "admitted he found the excess weight provision in the lease and meant to say something about it, but it had slipped his mind." [Clk. Tr. 220, lines 10-12.]

This is the evidence on which the court granted a motion for summary judgment. The evidence showed positively and without contradiction that there was no mistake or ambiguity about the per landing basis for the excess weight charge. (Deposition of Florence Murphy.) There could be no waiver by failure to bill, as there is no evidence (except for the alleged meeting of April 22, 1960, which is disputed) that Apple Valley was ever notified of the weight of the F27A, or that it was otherwise notified that the charge had become applicable, until February of 1964. The evidence on the alleged oral agreement was conflicting. Apple Valley claimed there was no agreement. (Affidavits of Cramer, Barris and Sawyer.) Bonanza claimed an agreement to accept a lesser charge, which would amount to some $10,000. (Hawkins' notes.) Even under Bonanza's view of the evidence, Apple Valley is entitled to this amount. On motion for summary judgment Bonanza's version cannot be the basis of judgment because of the disputed facts; but the court went further and held that Apple Valley, by its conduct and oral agreement, had waived the charge completely.

SUMMARY OF ARGUMENT AND SPECIFICATION OF ERRORS.

1. The court erred in granting a motion for summary judgment because there were conflicts in the evidence on each of the material issues on which the judgment was granted.

2. The court erred in denying recovery of any excess weight charge because Bonanza's evidence showed that it had agreed to pay at least a per schedule excess weight charge.

3. The affidavits submitted in support of the motion for summary judgment were insufficient as a matter of law.

I.

The Court Erred in Granting a Motion for Summary Judgment Because There Were Conflicts in the Evidence on Each of the Material Issues on Which the Judgment Was Granted.

The law is settled in this circuit and elsewhere that summary judgment is not a fact finding procedure. The sole question to be determined is whether there are any genuine issues of material fact. If the facts upon which the judgment can be predicated are conceded or at least undisputed by evidentiary showing, the motion may be granted. But if there is any conflict in the evidence summary judgment must be denied. The only procedure authorized for weighing and determining conflicting evidence is a trial. (*Sartor v. Arkansas Natural Gas Corp.* (1944), 321 U.S. 620, 627, 628-629 [88 L. Ed. 967, 64 S. Ct. 724]; *Consolidated Electric Co. v. U. S. Ex rel. Gough Industries Inc.* (9th

cir. 1966), 355 F. 2d 437, 438; *United States v. Diebold Inc.* (1962), 369 U.S. 654, 655 [8 L. Ed. 2d 176, 82 S. Ct. 993]; *Stevens v. Howard D. Johnson* (4th cir. 1950), 181 F. 2d 390, 394; *Walling v. Fairmount Creamery Co.* (8th cir. 1943), 139 F. 2d 318, 322; *Union Insurance Society v. William Glucken and Co.* (2d cir. 1965), 353 F. 2d 946, 951; *Taylor v. Black, Sivalls and Bryson* (8th cir. 1951), 189 F. 2d 213 216.)

Tested by these principals, the summary judgment in this case was clearly unwarranted. The court held that Apple Valley, by its conduct and oral agreement, had waived its right to any excess weight charge. There was a substantial conflict in the evidence on each of these points.[6]

Modification by Oral Agreement.

Insofar as a conflict in the evidence is concerned, the oral agreement need hardly be menionted. Bonanza relies on an oral agreement at a meeting on April 22, 1960. [Clk. Tr. 91-94.] Putting aside the question of whether Bonanza's evidence shows that any agreement was reached, there is a clear conflict in the evidence as to whether this meeting occurred at all. Apple Valley contends that there was no such meeting, and that there was no discussion at any time of the subject matter Bonanza claims was discussed at the alleged meeting. The Apple Valley representatives who were supposed to have been at this meeting are Barris and Sawyer. Neither has any recollection of such a meeting. Barris

[6]In this portion of the brief we assume for sake or argument that Bonanza's affidavits, if uncontradicted, would support the judgment. This is not conceded and later in this brief we will show that the judgment is improper even if the evidence were construed most favorably to Bonanza.

says he had nothing to do with lease negotiations until January of 1965. Sawyer has never discussed the excess weight charge provision with any Bonanza representative. [Clk. Tr. 213-223.]

Waiver by Conduct.

Waiver is the voluntary relinquishment of a known right. (*Hacker etc. v. Chapman* (1963), 17 Cal. App. 2d 265, 275 [61 P. 2d 944]; *Wienke v. Smith* (1918), 179 Cal. 220, 226 [176 Pac. 42]; *Roesch v. De Mota* (1944), 24 Cal. 2d 563, 572 [150 P. 2d 422]; *Strauss v. Owens* (1957), 148 Cal. App. 2d 570, 574 [307 P. 2d 81]; *Banducci v. Frank T. Hickey Inc.* (1949), 93 Cal. App. 2d 658, 662 [209 P. 2d 398].)

Under certain circumstances a person's conduct in failing to assert a claim may amount to a waiver. But in any such case it is essential to show that the person against whom the waiver is asserted knew the facts giving rise to the right and that he intended to waive the right.

Bonanza relies on the fact that Apple Valley did not bill for the excess weight charge until January of 1965. For present purposes we may assume that such conduct might amount to a waiver. But there is no proof, but for the alleged meeting of April 22, 1960, that Apple Valley was ever notified prior to February of 1964 that the excess weight charge was applicable. Up until June of 1960 Bonanza used DC3's. These airplanes weighed only 25,000 pounds. The operative fact is the weight of the F27A. Apple Valley could not be expected to bill for the excess weight charge unless it knew that the weight of the F27A was in excess of 25,000 pounds. There is no evidence except the claimed meeting of April

22, 1960, which is denied, that Apple Valley was ever notified of this fact prior to February of 1964. The affidavit of Cramer shows positively that Apple Valley did not know the weight of the F27A until it was told by Bonanza at the meeting of February, 1964. He immediately asserted Apple Valley's claim and Bonanza admitted its obligation. [Clk. Tr. 220-221.] This is not evidence of waiver. It shows there was no waiver.

II.

The Court Erred in Denying Recovery of Any Excess Weight Charge Because Bonanza's Evidence Showed That It Had Agreed to Pay at Least a Per Schedule Excess Weight Charge.

Probably the most astounding thing about the summary judgment is the way in which the court construed Bonanza's evidence of the oral agreement on April 22, 1960. In order to find a waiver by conduct the court had to find, as it did [Clk. Tr. 260], that there was a meeting on April 22, 1960. In doing so, the court had to disbelieve Barris' and Sawyer's testimony that there was no such meeting. The Court had no right to weigh the evidence and resolve their conflict. Bonanza's evidence that there was such a meeting is the only evidence to show that Apple Valley knew the F27A weighed more than 25,000 pounds, and hence should claim the excess weight charge. Without such knowledge there could be no waiver.

The problem is not only in finding that there was a meeting when the evidence was disputed as to whether there was a meeting at all. Once the court accepted Bonanza's version it should have at least found in accordance with Bonanza's evidence. That evidence does

not show a complete waiver of the excess weight charge by any stretch of the imagination. Bonanza says that what they hoped to obtain an agreement on was a lesser excess weight charge based on schedules instead of landings. Hawkins' notes show that Bonanza had specifically calculated its obligation under its interpretation to be approximately $151.20 per month. This would amount to at least $9,979.20 for the relevant period.

This evidence does not show a waiver of the excess weight charge. At most it shows only a waiver of the charge on a per landing basis, and an agreement by Bonanza to pay the charge per schedule. Apple Valley is at least entitled to the benefit of Bonanza's evidence which admits that over $9,000.00 is due for excess weight charges. [See: Hawkins' notes, Clk. Tr. 94.]

III.

The Affidavits Submitted in Support of the Motion for Summary Judgment Were Insufficient as a Matter of Law.

Summary Judgment is improper, not only when there is a conflict in the evidence, but also when the moving party's affidavits are not sufficient to support the judgment as a matter of law. (*Sartor v. Arkansas Natural Gas Corp.* (1944), 321 U.S. 620, 627 [88 L. Ed. 967, 64 S. Ct. 726].) Bonanza's affidavits are insufficent to support the judgment without regard to the opposing affidavits of Apple Valley.

There was no oral agreement to waive any part of the excess weight charge. The most Bonanza's affidavits show is that there was a discussion of the problem on April 22, 1960. Neither Arpin's affidavit nor

Hawkins' notes state unequivocally that there was any agreement. Arpin says that to the best of his recollection the Apple Valley representatives "concurred or appeared to concur" and stated that "Bonanza would be advised if they did not concur." [Clk. Tr. 92.] Hawkins' notes are equally uncertain as to whether there was any agreement. The notes say "I'm not sure they bought it." Newt Bass was to take it up with the Board of Directors and "we are supposed to get an answer shortly thereafter". [Clk. Tr. 92.] This is not evidence of an agreement. It shows only a discussion of the problem.

The proposition that Apple Valley waived the excess weight charge by failure to bill for it is even more questionable. In the first place, the lease says nothing about bills. The lease says only that Bonanza will pay the rent and other charges. [Clk. Tr. 5.] The affidavit of Thomas J. Van Bogart, the Bonanza comptroller, says that it is Bonanza's (not Apple Valley's) practice to provide a monthly activity report to the airport operator so that the airport can send a bill. [Clk. Tr. 97.] Attached to Van Bogart's affidavit are some of the activity reports sent to Apple Valley. [Clk. Tr. 101-111.] These do not show the weight of the airplanes or the number of schedules. They show only number of landings of F27A aircraft.

Bonanza claims that at the alleged meeting of April 22, 1960, Apple Valley either agreed or said that it might agree to reduce the excess weight charge to a per schedule charge instead of a per landing charge. This is not proof of waiver of all excess weight landing charges. The proposition of waiving the charge was never even considered. Immediately following the meet-

ing, Apple Valley did not bill for any excess weight charge at all. Can you infer from that that Apple Valley decided not only to agree to Bonanza's per schedule proposal, but also to give up the charge completely? Why should Apple Valley do that? This is an incredible assumption, and yet that is exactly what Bonanza's claim of waiver amounts to. Bonanza claims a waiver of all excess weight landing charges. Yet this is more than Bonanza ever asked for.

If we add the fact that Bonanza gave Apple Valley monthly activity reports and expected Apple Valley to bill based on those reports, it is even more difficult to infer a waiver. Bonanza came away from the meeting either thinking that it had an agreement for a per schedule charge or hoping to get one. But its activity reports showed landings, not schedules. This might be construed to mean that Bonanza thought Apple Valley did not agree to a per schedule charge, and so reported landings. This also raises an inference that there was no meeting at all. If Bonanza thought it had or hoped to have a per schedule agreement, it would have reported schedules. There is still a third way to construe this evidence. Paragraph 3(b) of the lease provides that the minimum charge up to 25,000 pounds is on a landing basis. There is no dispute about that. The only question is whether the excess weight charge is calculated on the same basis or on a schedule basis. At the meeting the parties did not solve the problem. Therefore, Bonanza gave Apple Valley activity reports

showing only landings, expecting to be billed for only the minimum charge, and to later pay the excess weight charge when the dispute was settled as to how this charge would be calculated.

There are probably more ways to interpret Bonanza's evidence. The point is that there is an inference that Apple Valley did not intend to waive the excess weight charge by not billing for it. This appears from Bonanza's affidavits alone, without regard to the conflicts raised by Apple Valley's affidavits. Bonanza's affidavits are not sufficient to support its motion for summary judgment.

Conclusion.

It was error to grant a summary judgment in this case. The affidavits show, without question, that there are material issues of fact to be tried. There is a sharp conflict as to whether there was any meeting on April 22, 1960 as claimed by Bonanza, or any other discussion of waiver of the excess weight charge. If Bonanza's contention is accepted that there was a meeting, its evidence shows that there was no agreement to waive the charge completely, but only to reduce it to a lesser amount. Apple Valley is at least entitled to a lesser amount. Bonanza's affidavits are also insufficient in and of themselves to support the summary judgment. The affidavits regarding the meeting do not show that any agreement was reached. The inference that Apple Valley intended to waive the excess

weight charge simply because it did not bill for it is tenuous at best. It is more logical, or at least just as logical, to infer that there was no intent to waive the charge. The judgment should be reversed, and the case remanded so that there can be a trial of these issues of fact.

Respectfully submitted,

BALL, HUNT, HART AND BROWN,
JOSEPH A. BALL,
STEPHEN A. CIRILLO,
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Attorneys for Appellant.

Certificate.

I certify that in connection with the preparation of this brief, I have examined Rules 18, 19 and 39 of the United States Court of Appeals for the Ninth Circuit and that, in my opinion, the foregoing brief is in full compliance with those rules.

JOSEPH D. MULLENDER, JR.